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No. 91-798

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LIZZIE BEATRICE EASTWOOD,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BEST AVAILABLE COPY

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BRIEF AND APPENDIX AMICUS CURIAE

COMES NOW, Cynthia Wilson Pryor, by and through her attorney of record, pursuant to Rule 37 of the Supreme Court Rules, and files this brief amicus curiae in the above-captioned case. Petitioner and Respondent have given their written permission to file this brief as required by Rule 37.3 (Appendix p. 20-21). The amicus curiae would show the

Court that her interest in this matter is that she is a Plaintiff in a railroad crossing accident case predicated on the common law and a statute of the State of Tennessee, Cynthia Wilson Pryor v. Norfolk Southern Railway Co., No. 91-2983 4A (United States District Court, Western District of Tennessee, Western Division). The Supreme Court's determination of issues on appeal will materially affect the applicant's rights in her litigation.

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INTEREST OF AMICUS CURIAE

The amicus curiae, Cynthia Wilson Pryor, was involved in a railroad crossing accident on Riverdale Road in Germantown, Tennessee on January 30, 1991. A Norfolk Southern Railway Company (hereinafter "Norfolk Southern") train hit Mrs. Pryor's automobile and caused catastrophic injuries to Mrs. Pryor. Mrs. Pryor subsequently filed an action in state court against Norfolk Southern alleging, in part, that the railroad breached its duty by operating its train negligently and by failing to provide adequate crossing warnings at the ultra-hazardous crossing. The Riverdale Road crossing is not protected with active warning signals, and a cross-buck sign located next to the track is the sole warning signal to motorists at the crossing. There are other confusing and misleading traffic signs for approaching motorists, and the sight distances at the crossing are substantially obstructed.

The action was removed to the United States District Court, Western District of Tennessee, Western Division.

The issue discussed herein brings a relevant matter to the attention of the Court that has not already been brought to its attention. See Rule 37.1. The accompanying brief demonstrates that Congress did not intend to preempt civil tort actions based on state common law. The federal statutes and regulations fail to empower a State Department of Transportation with authority to mandate the installation by the railroad of an adequate system of warning devices at an ultra-hazardous crossing.

STATEMENT OF FACTS

William Terry Cantrell, an engineer specialist with the Tennessee Department of Transportation (hereinafter "DOT"), was deposed in Mrs. Pryor's case. Mr. Cantrell is

involved with railroad safety and is on the Tennessee DOT's diagnostic team for railroad-highway crossing safety. Mr. Cantrell testified that Norfolk Southern was notified subsequent to Mrs. Pryor's accident that the diagnostic team recommended that active warning devices be installed at this crossing and that the railroad was requested to submit preliminary estimates and engineering.

At the time of the deposition, eight months had passed without any action by Norfolk Southern. In answer to a question of whose responsibility it is to see that railroads reasonably respond to the directions to properly signal crossings, Mr. Cantrell stated:

Q: Well, who's responsible for following up to see that the railroad reasonably respond to the directions to do something to properly signal these crossings?

A: There is to my knowledge no law that states that the railroads even have to do this. Not

too long ago, I want to say around 1984, there was a bunch of projects that were on our books that the railroads apparently disagreed with or did not want to do. And they were removed. There's no way that we can force them to actually do this, if they don't want to it. (Appendix p. 6, TR 218)

In addition, the state of Tennessee through legislative enactment has established a priority requiring railroads to install active warning devices at crossings where fatalities have occurred. Tenn. Code Ann. §65-11-113 (Appendix p. 14). The Tennessee DOT has apparently declined to enforce the state statute as established by Mr. Cantrell.

Q: You're saying that the State Department of Transportation doesn't see to the enforcement of this law?

A: There are no teeth in the law to my knowledge where we could enforce them. I'm not sure whether there's \$100 a day fine or anything to that effect. And that's what I've also heard, there are no teeth in the law to enforce such law. (Appendix p. 9-10, TR 221-222.)

SUMMARY OF THE ARGUMENT

There is no federal statutory or regulatory requirement that railroads complete preliminary engineering and construction of appropriate warning devices within a certain or reasonable time. Consequently, there is no incentive for a railroad to adequately signal a crossing in compliance with a DOT's determination or the Tennessee statute if the railroad is immune to an injured party's common law tort action or a tort action based on the railroad's breach of a state's statutory duty to install active warning devices at a crossing after a fatality has occurred. Congress did not intend to preempt the state statutes applicable to or common law actions against railroads by the passage of the Federal Railroad Safety Act of 1970, 45 U.S.C. §434, and leave the public and governmental authorities without a remedy for a noncooperative and delinquent railroad

jeopardizing public safety and welfare.

ARGUMENT

In an effort to eliminate hazards from railroad crossings, Congress provided federal funds for the costs of such construction. 23 U.S.C. §130(a). See also 23 C.F.R. §646.208. Later, Congress mandated each state to inventory its crossings and to establish and implement a schedule for improvements. 23 U.S.C. §123(d).

The United States Federal Highway Administration adopted regulations "to prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities." 23 C.F.R. §646.200(a). These regulations envision cooperation between state government and the railroads. For example, 23 C.F.R. §646.216(b) provides for preliminary engineering work on crossing projects "[a]s mutually agreed to by the state

highway agency and the railroad." Also, the railroads must give the state and FHWA reasonable opportunity to inspect scrap materials it recovers during construction of improvements. 23 C.F.R. §646.216(f)(3).

There is not, however, any incentive for the railroad to cooperate in the improvement process or to make efforts to complete its work within a reasonable amount of time if tort actions based on state statutes or common law are preempted. As Mr. Cantrell's deposition testimony indicates, the railroads may not be compelled to correct ultra-hazardous crossings. Congress did not intend to preempt state statutes or common law that require railroads to act reasonably in signaling their crossings for the adequate protection of the public. Private civil tort actions based on state statutes or common law provide the only incentive to railroads to correct these hazardous crossings.

Similarly, in Southern California Meat Cutters Union and Food Employers Pension Trust Fund v. Investors Research Co., 687 F.Supp. 506 (C.D. Cal. 1988), the court addressed a broadly worded preemption statute. Section 1144 of ERISA preempts all state laws relating to employee benefit plans. Section 1109 provides for liability of an ERISA fiduciary caused by breach of that fiduciary's duty, but is silent as to the duty of a non-fiduciary. The issue arose whether Congress intended to preempt an action against a non-fiduciary based on state law. The court held, "The fact that ERISA is a comprehensive statute and yet does not provide a remedy for non-fiduciary misconduct is a good indication that Congress did not intend to regulate such behavior, but rather, that Congress believed regulation of fiduciary behavior would sufficiently protect benefit plans." Id. at 509.

CONCLUSION

In addition to the reasons cited by Respondent Easterwood in her Brief to this Court, this amicus curiae brings to the attention of the Court the fact that Congress did not intend to preempt state common law tort actions against railroads because the federal statutes and regulations which establish limited funding for the improvement of crossings do not empower the responsible federal and state agencies to insure that the improvements are made. The judgment in No. 91-790 should be affirmed.

Respectfully submitted,

J. N. Raines
James S. Strickland, Jr.
**GLANKLER, BROWN, GILLILAND,
CHASE, ROBINSON & RAINES**

1700 One Commerce Square
Memphis, Tennessee 38103
(901) 525-1322

Counsel for Amicus
Curiae Cynthia Wilson Pryor

CERTIFICATE OF SERVICE

I, J. N. Raines, a member of the Bar of this Court, pursuant to Rule 29 of the Supreme Court Rules, certify that the Brief of Amicus Curiae Cynthia Wilson Pryor has been mailed on October 13, 1992, via the United States mail service, with first class postage prepaid, to all parties required to be served as follows:

JACK H. SENTERFITT, Esq.
1201 West Peachtree
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Counsel for Respondent/Cross Petitioner
Lizzie Beatrice Easterwood

J. N. RAINES

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IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

CYNTHIA WILSON PRYOR,

Plaintiff,

vs.

No. 42332-5

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

The deposition of: WILLIAM TERRY CANTRELL
January 7, 1992

Examination by Mr. Raines Page 3

						Jeske & Jeske				
						403 American Trust Building				
						Nashville, Tennessee				
						(615) 242-4441				

The deposition of William Terry Cantrell,
taken by agreement, at James K. Polk Building,
Nashville, Tennessee, beginning at 8:45 a.m.,
January 7, 1992, at the instance of the
Plaintiff, pursuant to the provision of the
Tennessee Rules of Civil Procedure.

Formalities as to caption, certificate,
reading by the witness, signing by the
witness, and filing are waived. Objections
except as to the form of the questions are
reserved for the hearing. The reporter, being
a notary public, may swear and sign the name
of the witness.

A P P E A R A N C E S:

For the Plaintiff:

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Everett B. Gibson Law Firm
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* * * * *

WILLIAM TERRY CANTRELL,
having been first duly sworn, testified as
follows:

EXAMINATION BY MR. RAINES:

Q. Would you state your name, please.

A. William Terry Cantrell.

Q. And, Mr. Cantrell, what is your job?

A. I'm Engineer Specialist 1, Tennessee
Department of Transportation.

Q. What is the Tennessee Department of
Transportation?

A. What is the Tennessee Department of
Transportation? Multipurpose organization
directed to administer federal projects for
aeronautics, rail, highways, et cetera.

Q. State agency?

A. Yes, it is.

Q. And who heads up the state agency?

A. I guess Ned McWherter. He signs the
paycheck, but it's Commissioner Jimmy Evans
under him.

Q. Ned is the governor?

A. Yes, he is.

Q. And Jimmy Evans is the Commissioner
of the Department of Transportation?

A. That is correct.

Q. And that's considered in the state

EXAM BY MR. RAINES

* * *

A. No, not to my knowledge. This is Mr. Zager's area.

Q. Well, who's responsible for following up to see that the railroads reasonably respond to the directions to do something to properly signal these crossings?

A. There is to my knowledge no law that states that the railroads even have to do this. Not too long ago, I want to say around 1984, there was a bunch of projects that were on our books that the railroads apparently disagreed with or did not want to do. And they were removed. There's no way that we can force them to actually do this, if they don't want to do it.

Q. Well, why is it that you deal with the railroads? Why don't you go out and let this bid out to a general contractor to do the work that you think is necessary to protect

the citizens of the State of Tennessee?

A. Because it's -- well, this is something that happened years ago. The projects that they did not want to do had fallen from ranking. They actually proved to be right about the validity of those particular few crossings, the railroads. Since then I don't know of any crossings they have not done.

EXAM BY MR. RAINES

* * *

A. Yes, I am.

Q. And are you aware that a fatality --

MR. GIBSON: Excuse me, the statute in question was passed in 1974, two years after your fatality.

MR. RAINES: And the legislature made it retroactive.

Q. Are you familiar with the statute?

A. I'm familiar with it. I'm familiar with the statute. It was passed in '74 to my knowledge. I'm not sure that any of them were done retroactively because there wasn't records available before '74. But, again, this all predates me. I do know that the law is almost totally unenforceable. To my knowledge in the entire time I've been associated with this section, there has not been one instance where a railroad could possibly comply with this law because of the

materials hang-up. No railroad stocks surplus supplies or materials because each crossing is different. It has different requirements, circuitry, et cetera, and it's almost a customized situation. And I have never heard of anybody being able to complete a project within six months.

Q. You're saying that the State Department of Transportation doesn't see to the

EXAM BY MR. RAINES

* * *

enforcement of this law?

A. There are no teeth in the law to my knowledge where we could enforce them. I'm not sure whether there's \$100 a day fine or anything to that effect. And that's what I've also heard, there are no teeth in the law to enforce such a law.

Q. So to your knowledge the State Department of Transportation does not enforce that law?

A. No.

MR. RAINES: I believe that's all the questions I have.

MR. GIBSON: I have got to go to the airport. You're not going to examine those files that show what other crossings were --

MR. RAINES: Well, I'm not going to do it today.

MR. GIBSON: Well, I'll reserve my cross-examination then for when we resume for you to do whatever you're going to do.

MR. RAINES: I'm not sure we'll come back. If you want to --

MR. GIBSON: Let's do it all at once.

MR. RAINES: I know I may or may not have further questions.

EXAM BY MR. RAINES

* * *

STATE OF TENNESSEE)
) ss.
COUNTY OF DAVIDSON)

I, Laura L. Meyer, Notary Public in and
for the State of Tennessee at Large,

DO HEREBY CERTIFY that the foregoing
deposition was taken at the time and place et
forth in the caption thereof; that the
deponent therein was duly sworn on oath to
testify the truth; that the proceedings of
said deposition were stenographically reported
by me in the shorthand; and that the foregoing
pages constitute a true and correct
transcription of said proceedings to the best
of my ability.

I FURTHER CERTIFY that I am not a
relative of employee or attorney or counsel of
any of the parties hereto; nor a relative or
employee of such attorney or counsel, nor do I
have any interest in the outcome or events of
this action.

IN WITNESS WHEREOF, I have hereunto

affixed my official signature and seal of
office this 15th day of January 1992, at
Nashville, Davidson County, Tennessee.

Laura L. Meyer
Notary at Large
State of Tennessee

My Commission Expires:
November 27, 1993.

65-11-113. Automatic warning or protective devices. -- (a)(1) Within six (6) months after the occurrence of a fatality resulting from a collision between any railroad engine or train and a vehicle or pedestrian at any unmarked railroad grade crossing, where there are regularly scheduled trains, one (100) or more vehicles cross daily and it is also a regular school bus crossing, and/or upon the order of the commissioner of transportation or his designee, the railroad company responsible for maintaining the track and right of way at such grade crossing shall install or cause to be installed a railroad crossing marker with automatic flashing signal lights and a bell on either side of the tracks along such street, road or highway crossing such tracks, in such a manner that approaching motorists, riders or pedestrians may be warned of the hazard and alerted to watch for an oncoming train or engine.

(2) A railroad company shall have six (6) months from the time of an order of the commissioner or his designee in which to install or cause to be installed the automatic warning or protective devices required. If such devices are not installed and operative at the end of this period of time, and the commissioner has not granted an extension based on hardship or act of God, the speed of trains operating within one (1) mile in each direction of such crossing shall be restricted to not more than twenty-five (25) miles per hour. This restriction shall continue until the devices are fully operational.

(b)(1) The cost of installing such signal devices shall be borne equally by the railroad company, the state of Tennessee, and the county, or the municipality, if such signal devices are installed within the corporate limits or the metropolitan government, where applicable.

(2) Payment of the state's share shall be made as reimbursement of the railroad company of one third (1/3) of the cost of such installation, by warrant of the commissioner of finance and administration upon the state treasury, after inspection of the site and certification by the commissioner of transportation or his designee that such signal devices have been installed in compliance with this section; provided that the railroad company has first submitted to the commissioner of finance and administration a sworn statement of the total costs incurred by the railroad company in installing such signal devices.

(3) Payment of the municipality's or county's or metropolitan government's share of the costs shall similarly be made in accordance with the fiscal procedures of such municipality, county, or metropolitan government after receipt of a sworn statement

from the railroad company of the total cost of the installations and verification of such installation by the appropriate municipal, county or metropolitan government official.

(c) If any county, municipal or metropolitan government fails or refuses to reimburse the railroad company as provided herein, the commissioner of finance and administration shall cause the necessary amount of money to be withheld from such county, municipal or metropolitan government any amount due such county, municipal or metropolitan government from the proceeds of the state gasoline tax and reimburse the railroad company using such funds otherwise due the county, municipal or metropolitan government. The Tennessee department of transportation shall be prohibited from adopting any rules or regulations which will circumvent the purposes of this section by setting incompatible criteria for determining

priorities for the installation of railroad crossing signals.

(d) In the event federal funds are available to defray the cost of such installation in whole or in part, the federal rules then applicable shall determine the allocation of the costs of such installation.

(e) Any railroad company failing to comply with the requirements of subsections (a)-(d) are subject to a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) for each day of continued violation.

(f) The department of transportation is authorized to construct protective or warning devices at or in the vicinity of any railroad crossing of a public highway owned by a county or incorporated city or town, based upon the showing of need resulting from a multidisciplinary study, whenever federal funds are available for such construction.

The department is further authorized to supply a maximum of one percent (1%) of the funds required for such construction provided the county or incorporated city or town in which the construction will be performed complies with the necessary conditions for receipt of the balance of federal matching funds for such construction. [Acts 1974, ch. 646, §§ 1,2; Acts 1979, ch. 236, § 1; T.C.A., §§ 65-1113, 65-1115; Acts 1983, ch. 184, § 1; T.C.A., § 65-114.]

September 25, 1992

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Re: Pryor v. Norfolk Southern Railway Co.
Amicus Curiae Brief of Cynthia Wilson Pryor
Our File No. 04185.4967

Gentlemen:

After sending each of you our Brief and Appendix Amicus Curiae of Cynthia Wilson in support of Respondent, our office spoke with Mr. Parker. He informed us that each party has agreed to consent to the filing of all amicus curiae briefs.

Under the Supreme Court rules, we must obtain the written consent of each of you. Please sign the bottom of this letter and fax it back to me today representing your consent to our filing the brief. Our fax number is (901) 525-2389.

Very truly yours,

GLANKLER, BROWN, GILLILAND,
CHASE, ROBINSON & RAINES

J. N. Raines

GLANKLER, BROWN, GILLILAND, CHASE, ROBINSON & RAINES

Mr. James I. Parker
Mr. Jack Senterfitt
Page 2
September 25, 1992

/s/
JAMES I. PARKER
Attorney for
Respondent

Dated: 10/12/92

/s/
JACK SENTERFITT
Attorney for
Petitioner

Dated: 10/12/92